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No. 88-350

In The

Supreme Court of the United States

October Term, 1988

DEBORAH ANDERSON AND LAWRENCE ANDERSON,

Petitioners,

v.

NORTH DAKOTA,

Respondent.

MARK DAGLEY AND LYNETTE DAGLEY,

Petitioners,

v.

NORTH DAKOTA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether § 15-34.1-03(1) of the North Dakota Century Code which requires all teachers who teach in private home schools in North Dakota to be certified, violates the Free Exercise Clause of the First Amendment to the United States Constitution by impermissibly prohibiting petitioners from the free exercise of their religion.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully requests this Court to deny the Petition for Writ of Certiorari which seeks the review

of the decision of the Supreme Court of the State of North Dakota in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The question presented in this petition involves the following constitutional and statutory provisions.

UNITED STATES CONSTITUTION

United States Constitution First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .

United States Constitution Fourteenth Amendment:

> . . . [N]or shall any State deprive any person of life, liberty or property, without due process of law . . .

NORTH DAKOTA CONSTITUTION

North Dakota Constitution Article VIII, § 1

> A high degree of intelligence, patriotism, integrity and morality on the part of every voter in a government by the people; being necessary in order to insure the continuance of that government and the propriety and happiness of the people, the legislative assembly shall make provision for the establishment and maintenance of a system of public schools which shall be open to all children of the state of North

Dakota and free from sectarian control. This legislative requirement shall be irrevocable without the consent of the United States and the people of North Dakota.

NORTH DAKOTA CENTURY CODE

North Dakota Century Code § 15-34.1-01

Compulsory attendance. Every parent, guardian, or other person who resides within any school district, or who resides upon any government base or installation without any school district, and has control over any educable child of an age of seven years to sixteen years who does not fall under the provisions of sections 15-34.1-02 or 15-34.1-03, shall send or take such child to a public school each year during the entire time such school is in session.

North Dakota Century Code § 15-34.1-03

Compulsory attendance – Exceptions. The parent, guardian, or other person having control of a child required to attend school by the provisions of this chapter shall be excused by the school board from causing the child to attend school whenever it shall be shown to the satisfaction of the board, subject to appeal as provided by law, that one of the following reasons exists:

1. That the child is in attendance for the same length of time at a parochial or private school approved by the county superintendent of schools and the superintendent of public instruction. No such school shall be approved unless the teachers therein are legally certificated in the state of North

Dakota in accordance with section 15-41-25 and chapter 15-36, the subjects offered are in accordance with sections 15-38-07, 15-41-06, and 15-41-24, and such school is in compliance with all municipal and state health, fire, and safety laws.

2. That the child has acquired the branches of learning taught in the public schools and has completed high school.

3. That the child actually is necessary to the support of his family, which shall be a question of fact to be determined by the governing board of the district with the approval of the county superintendent of schools, and such determination shall be subject to review by the superintendent of public instruction on appeal.

4. That the child is in such physical or mental condition as to render attendance or participation in the regular or special education program inexpedient or impracticable. Such condition shall be shown by a declaration of a multidisciplinary team which includes the director of special education of the special education unit of which the school district of residence is a member, the school superintendent of the child's district or residence, the child's classroom teacher, the child's physician, and the child's parent or guardian.

North Dakota Century Code § 15-36-01

Teachers' certificates – Criteria to be established. The superintendent of public instruction, after consulting with the teachers' professional practices commission, shall determine the criteria for teacher certification for school terms beginning on or after July 1, 1974. The established criteria shall be based upon

standards which shall include considerations of character, adequate education preparation, and general fitness to teach in the public schools of this state. After holding a public hearing thereon, the superintendent shall issue rules and regulations concerning the issuance of teachers' certificates, and such certificates shall be issued by his office in accordance with such rules and regulations. However, any teacher who has graduated from college in an accredited teacher education program on or before September 1, 1980, shall not be required to earn any college credits in native American or other multicultural courses in order to be certified or recertified. Nothing in this section shall be interpreted to affect the validity of life certificates in existence on July 1, 1973, nor shall this section affect vocational education certificate qualifications as provided in chapter 15-20.1.

STATEMENT OF THE CASE

Under North Dakota law parents are required to send their children from seven to sixteen years of age to public school. Upon application to the local school board, parents may be excused from compliance with the compulsory school attendance law, inter alia, on the basis of the child's attendance at an approved private school. However, under North Dakota law, every teacher within the state, whether employed in a public, parochial, or private school, must be certified and therefore, for a private home school to be approved, its teachers must be certified. Petitioners challenge the constitutionality of the teacher certification requirement on the ground that it violates the Free Exercise Clause of the First Amendment to the United State Constitution.

Petitioners, Mark and Lynette Dagley, are husband and wife and at all times material, they lived in the city of Mandan and within the Mandan Public School District. They are the parents of a daughter, Carrie, who was born September 27, 1978, and who was required to attend public school during the 1986-87 school year unless otherwise excused. The Dagleys did not send Carrie to a public school during the 1986-87 school year, nor did they apply for an excuse from attendance from the Mandan School Board. Instead, they themselves undertook to educate Carrie in their home in what the Dagleys claim is a private or home school which they named the Dagley Home Academy. The Dagleys never sought to have the Dagley Home Academy approved as a private school. However, the Dagley Home Academy was not eligible for approval. Although each of the Dagleys is college educated neither Mark nor Lynette Dagley was a certified teacher in the State of North Dakota.

The Dagleys were charged on October 1, 1986, with violating the state's compulsory school attendance law for their failure to send Carrie to a public school. They were found guilty of this offense after a trial to the court on March 24 and 25, 1987, and on July 2, 1987, the court deferred the imposition of sentence for one year on the condition the Dagleys commit no further violations of the compulsory school attendance law.[1]

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[1] Violations of the compulsory school attendance law are classified as infractions for which the maximum penalty is a

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During trial Mark Dagley testified in essence that his refusal to send Carrie to public school was based in part because he believed the Dagley Home Academy could provide better education than the public school, in part because he wanted to avoid negative peer influences, and in part because his religious beliefs required him to be responsible for his child's education. He testified that he would not be averse to sending Carrie to a private school whose philosophy and content of instruction would be compatible with his religious beliefs, but he maintained that the cost of this education would be unduly burdensome since there was no such school in the immediate area. Neither Mark nor Lynette Dagley expressed any personal objection to becoming a certified teacher, but both claimed that they could not afford the time and expense necessary in becoming certified as teachers. Both of the Dagleys testified that they would be agreeable to a state system of regular testing and evaluation of their home school in lieu of teacher certification.

Experts for both sides testified that North Dakota ranks very high in the nation in the quality of its education, despite the fact that its teacher corp is among the lowest paid in the nation. The Dagleys' expert witness attributed this phenomena to various factors including socio-economic factors and smaller class sizes. These factors distinguish North Dakota from most of the other states. The State's expert witness, Mr. Stastney, would also include as a major contributing factor teachers'

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$500.00 fine. However, under state law a second violation of the same infraction within one year can, upon motion of the prosecuting attorney, be classified as a Class B Misdemeanor which is punishable by a maximum fine of $500.00 and a maximum jail sentence of thirty days.

knowledge and ability to teach acquired through the certification process.

The Dagleys claim that two major alternatives to teacher certification were available which would do just as well in meeting the state's interest in the education of its youth. The first alternative was a series of rejected proposals for legislation during the last session of the North Dakota Legislature that would have eliminated the teacher certification requirement for private home schools. However, all of these proposals called for a system of regular testing and evaluation of the private home school in lieu of teacher certification. The state's expert conceded that these various rejected proposals would adequately meet the state's interest in the education of its youth, but only because of the testing and evaluation. The second alternative to teacher certification consisted of the Dagleys' presentation of statutory schemes in other states which they labeled and presented as less restrictive alternatives.

The case of petitioners, Deborah and Lawrence Anderson, presented similar facts and a similar challenge to the North Dakota teacher certification requirement by claiming that these same lesser restrictive alternatives were available to meet the state's compelling interest in education.

SUMMARY OF ARGUMENT

None of these petitioners claim a religious-based objection to the certification concept. They merely argue they want to teach their children themselves, but they do

not want to go to the time and trouble of obtaining certification. At most then, the teacher certification requirement merely makes it more difficult for these petitioners to practice their religious beliefs. It does not prohibit these petitioners from the exercise of their religious beliefs nor does it work as an indirect coercion or penalty on the free exercise of those beliefs.

Contrary to petitioners' claims, the North Dakota teacher certification requirement is the least restrictive means available for the state to meet its compelling interest in education. The rejected proposals for new legislation, which would have in effect required regular testing and evaluation of private, religion-oriented home schools, appear to be no less restrictive and arguably are more restrictive than teacher certification.

Petitioners' premise that the experience of other states establishes a less restrictive alternative cannot be accepted because: (1) this is essentially the same argument as petitioners present in their first alternative to teacher certification, (2) the matter of compulsory education is essentially a state or local issue which should properly be addressed by each state in the manner it deems best, provided the means used does not prohibit the free exercise of religious beliefs, and; (3) this argument, if followed to its logical conclusion, would inevitably result in a determination that virtually every other state's compulsory education statute is unconstitutional.

ARGUMENT

I. NORTH DAKOTA COMPULSORY SCHOOL ATTENDANCE LAWS DO NOT PROHIBIT PETITIONERS FROM THE FREE EXERCISE OF THEIR RELIGIONS.

This Court has repeatedly held that the Free Exercise Clause protects not only against prohibitions on the free exercise of religion, but also against indirect coercions and penalties on the free exercise of religion.[2] *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. ___, 108 S.Ct. 1319, 1326, 99 L.Ed.2d 534 (1988). However, as the Court noted in *Lyng, supra*, the critical word in the constitutional text of the First Amendment is the word "prohibit." Therefore, if governmental action does not prohibit free exercise rights or tend to coerce individuals into acting contrary to their religious beliefs, that action is not subject to scrutiny under the First Amendment. *Lyng, supra*, 108 S.Ct. at 1326. Therefore, governmental actions which merely make it more difficult to practice certain religions do not, "require the government to bring forward a compelling justification for its otherwise lawful actions." *Id.* Here, petitioners testified at trial that their decision not to educate their children in the public schools or comply with compulsory school attendance laws was based only in part upon their religious beliefs. Those beliefs did not require petitioners to refrain from placing their children in the public schools. Petitioners

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[2] The same restriction on governmental action applies to state governments as well through the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).

only asserted that their ability to teach principles of their religious beliefs to their children would be enhanced by private home schooling. Petitioners did not allege or contend at any time that they are opposed to the teacher certification requirement on religious grounds. They only argue that the teacher certification requirement makes it more difficult for them to educate their children themselves. The facts of this case then are significantly different then those presented in *Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). In *Yoder, supra,* the religious beliefs in question compelled the parents to refrain from educating their children in public high schools. To do so would have been contrary to the Amish religion and way of life. 406 U.S. at 209, 92 S.Ct. at 1530. Here, petitioners present no such religious objection to education. They themselves are well educated having extensive college educations. Moreover, these petitioners do not segregate themselves from society as the Amish did in *Yoder, supra.* These petitioners seek to become well educated and to use their education to pursue careers in which they intermingle with the rest of society. Consequently, the North Dakota compulsory school attendance laws, in particular the teacher certification requirement, do not prohibit, in the sense that word is used in the Free Exercise Clause, petitioners from the free exercise of their religious beliefs. The best argument petitioners can make is that this statutory scheme merely makes it more difficult for them to practice their religious beliefs. This argument is not sufficient to invoke First Amendment scrutiny. *Lyng, supra,* at 1326.

II. NORTH DAKOTA'S TEACHER CERTIFICATION REQUIREMENT IS THE LEAST RESTRICTIVE MEANS BY WHICH THE STATE CAN MEET ITS COMPELLING INTEREST IN EDUCATION.

Like any other state, North Dakota has a compelling interest in the education of its people. *Brown v. Topeka Board of Education*, 347 U.S. 483 (1954), *State v. Patzer*, 382 N.W.2d 631 (N.D.), cert. denied, 107 S.Ct. 99 (1986). As a matter of state constitutional law, every child in the state has a right to a public school education, free from sectarian control. N.D. Const. Art. VIII § 1. As part of its effort to meet this compelling interest, North Dakota has long required that all of its teachers be certified, whether they be employed in public, parochial or private schools. N.D.C.C. §§15-34.1-03 and 15-36-01. This requirement has been upheld against challenges based on Free Exercise grounds before. *State v. Pratzer, supra; State v. Rivinius*, 328 N.W.2d 220 (N.D. 1982), cert. denied, 460 U.S. 1070, 103 S.Ct. 1525, 75 L.Ed.2d 948 (1983); *State v. Shaver*, 294 N.W.2d 883 (N.D. 1980). In each of these cases the court rejected claims that teacher certification was not the least restrictive method for the state to meet its compelling interest in education. Likewise, similar teacher certification requirements have been upheld against similar challenges in other jurisdictions. *Johnson v. Charles City Community Schools Board of Education*, 368 N.W.2d 74 (Iowa), cert. denied sub nom., 474 U.S. 1033, 106 S.Ct. 594, 88 L.Ed.2d 574 (1985); *Sheridan Road Baptist Church v. Department of Education*, 426 Mich. 462, 396 N.W.2d 373, cert. denied, 107 S.Ct. 2183 (1987); *Fellowship Baptist Church v. Benton*, 815 F.2d 485 (8th Cir. 1987); *Burrows v. Arkansas*, 669 S.W.2d 441 (1984).

The North Dakota Supreme Court in *Patzer, supra,* noted, "While a teacher certificate is no guarantee that the holder is a competent teacher, it does guarantee that the holder has been exposed to the knowledge that a competent teacher should have." *State v. Patzer,* 382 N.W.2d at 639. If the "modern understanding of education is that the proof is in the pudding rather than in the formula,"[3] then the North Dakota teacher certification requirement has stood the test and proved itself. Traditionally, North Dakota students have ranked very high in the nation in achievement. In short, the teacher certification requirement works very well. It meets the State's compelling interest in education.

Petitioners make a claim that it is "undisputed that North Dakota has the most restrictive law in the nation regarding home schooling." Petition for Writ of Certiorari, at p. 24. The State believes this claim is made without any foundation whatsoever in light of the fact that this issue has been thoroughly litigated, argued, and decided in favor of the state in *State v. Patzer, supra; State v. Rivinius, supra* and *State v. Shaver, supra.* Moreover, petitioners do not present any authority, criteria, or established rule of law by which they can support this claim. The only apparent basis for petitioners' claim that North Dakota's law is the most restrictive, because of its teacher certification requirement, is their own say so. That is not enough. In *State v. Patzer, supra,* the North Dakota Supreme Court compared its teacher certification requirement to provisions in other states which allowed home schooling by instructors with qualifications "essentially

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[3] Petition for Writ of Certiorari, at p. 33.

equivalent" to minimum standards set for public school teachers. The court also looked at statutory schemes which used systems of testing and subjective evaluation in lieu of teacher certificates. *State v. Patzer, supra* at pp. 638-9. After making such review the court concluded that the teacher certification requirement "is a reasonably narrow one and . . . amply justified . . . The court upheld teacher certification against a claim it was not the least restrictive alternative available, and further found teacher certification to be preferred to testing in meeting the State's interest in education.

Petitioners claim that there is now new evidence to show that other less restrictive alternatives are available. First, they point to various bills of proposed legislation which the North Dakota Legislature rejected during its last session. All of those rejected proposals would have substituted teacher certification with a system of testing and evaluation. They were borrowed from laws of other states. These alternatives therefore were not new, and were not materially different from those which the court rejected in *State v. Patzer, supra,* and which the court had found to be arguably more restrictive than teacher certification. *Id.* at 638-9. Thus, petitioners' claim of a less restrictive alternative to teacher certification on this ground is without merit.

Petitioners' second claim of a less restrictive alternative, namely the statutory schemes or experiences of other states, is, for the same reasons, also without merit. It may be true that since *State v. Patzer, supra,* was decided, other states have moved away from teacher certification. However, this is not to say that teacher certification is more restrictive. This fact is evidence only

that those states have chosen not to regulate teacher training.

In *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), this Court admonished other courts to "move with great circumspection in performing the sensitive and delicate task of weighing a state's legitimate social concern when faced with religious claims for exemption from generally applicable education requirements." *Id.* at 235, 92 S.Ct. at 1543. "[C]ourts are not school boards or legislatures, and are ill-equipped to determine the necessity of discrete aspects of a state's program of compulsory education." *Id.* Following this admonition, the Court in *Fellowship Baptist Church v. Benton, supra* at 493, rejected the argument that the experience and statutes of other states constituted a less restrictive alternative to teacher certification. In *Braunfeld v. Brown*, 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961), this Court, in determining that the Pennsylvania Sunday closing law did not violate the Free Exercise Clause, considered statutory schemes from other states which were proposed as less restrictive alternatives. This Court rejected such evidence and arguments, noting, "[T]his may well be the wiser solution to the problem. But our concern is not with the wisdom of legislation, but with its constitutional limitation." 366 U.S. at 608. These cases have implicitly recognized that a particular state's social or educational concerns when faced with religious claims for exemption are an essentially local concern which cannot be and should not be determined by other states' laws. As this Court recognized in *Braunfeld v. Brown, supra,* and very recently in *Lyng, supra,* all that is required

of North Dakota is that its law comply with the dictates of the Free Exercise Clause. That, the State has done.

Moreover, petitioners argue that only the very least restrictive alternative will suffice, but then, to support this statement they lay on the table various statutory schemes of other states, no two of which are the same. Using petitioners' logic, only one state could claim to have the "least restrictive alternative" concerning the statutory means of regulating private home schools and even that one state would be subject to a claim that some heretofore untried statutory scheme would be even less restrictive. Hence, petitioners' argument here is self-defeating. Obviously, this Court in *Braunfeld, supra,* and *Yoder, supra,* recognized this problem in allowing a particular state to deal with social and educational concerns in a manner it deems best.

CONCLUSION

The North Dakota compulsory school attendance laws do not prohibit these petitioners from the free exercise of their religious beliefs. Moreover, even if the teacher certification requirement for private, religious-oriented home schools does infringe upon petitioners' rights under the Free Exercise Clause, it does so constitutionally because the teacher certification requirement is the least restrictive means by which North Dakota can meet its compelling interest in the education of its youth. For these reasons, the petition for writ of certiorari should be denied.

Dated this 3rd day of November, 1988.

Respectfully submitted,

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